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5 **UNITED STATES DISTRICT COURT**  
6 **DISTRICT OF NEVADA**

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8 R. KEITH MAIDMAN,

9 Plaintiff,

10 v.

11 ANTHONY DEMEO; RICHARD  
12 MARSHALL; TERRI RISING; and NYE  
COUNTY DETENTION CENTER,

13 Defendants.  
14  
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Case No. 2:12-cv-00474-APG-NJK

**ORDER GRANTING DEFENDANTS' MOTION  
FOR SUMMARY JUDGMENT**

(Dkt. No. 46.)

16 **I. BACKGROUND**

17 Presently before the Court is the motion for summary judgment [Dkt. #46] filed by  
18 defendants Richard Marshall and Terri Rising ("Defendants"), who are the only remaining  
19 defendants in this case. (Dkt. No. 46, the "Motion.") In assessing the Motion, the Court has also  
20 considered the First Amended Complaint (Dkt. No. 6, the "FAC"), R. Keith Maidman's  
21 ("Maidman's") Affidavit of Conditions (Dkt. No. 44),<sup>1</sup> Maidman's response to the Motion (Dkt.  
22 No. 48), and Defendants' reply (Dkt. No. 49).  
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25 <sup>1</sup> Although Maidman filed this affidavit before Defendants filed the Motion, the Court nonetheless  
26 considers the affidavit as part of Maidman's response to the Motion. *See Thomas v. Ponder*, 611 F.3d  
27 1144, 1150 (9th Cir. 2010) ("Courts should construe liberally motion papers and pleadings filed by *pro se*  
28 inmates and should avoid applying summary judgment rules strictly."). Likewise, the Court considers the  
prison documents attached to the FAC (Dkt. No. 6 at 10–11) as part of the record for summary judgment  
purposes.

1 Maidman claims under 42 U.S.C. § 1983 that Defendants violated the Eighth  
2 Amendment's prohibition of cruel and unusual punishment by housing him in an overcrowded  
3 cell with a leaking toilet such that he had to sleep on a floor covered with raw sewage. (Dkt. No.  
4 6.) He also claims a violation of the Sixth and Fourteenth Amendments because the Nye County  
5 Detention Center in Pahrump, Nevada ("NCDC") does not have a law library and the electronic  
6 legal materials available in Tonopah, Nevada<sup>2</sup> are approximately five years old. (*Id.*)

## 7 8 **II. ANALYSIS**

9 The Federal Rules of Civil Procedure provide for summary adjudication when the  
10 pleadings, depositions, answers to interrogatories, and admissions on file, together with the  
11 affidavits, if any, show that "there is no genuine dispute as to any material fact and the movant is  
12 entitled to judgment as a matter of law." FED. R. CIV. P. 56(a). Material facts are those that may  
13 affect the outcome of the case. *See Anderson v. Liberty Lobby, Inc.*, 477 U.S. 242, 248 (1986). A  
14 dispute as to a material fact is genuine if there is sufficient evidence for a reasonable jury to  
15 return a verdict for the nonmoving party. *See id.* "Summary judgment is inappropriate if  
16 reasonable jurors, drawing all inferences in favor of the nonmoving party, could return a verdict  
17 in the nonmoving party's favor." *Diaz v. Eagle Produce Ltd. P'ship*, 521 F.3d 1201, 1207 (9th  
18 Cir. 2008) (citing *United States v. Shumway*, 199 F.3d 1093, 1103–04 (9th Cir. 1999)). A  
19 principal purpose of summary judgment is "to isolate and dispose of factually unsupported  
20 claims." *Celotex Corp. v. Catrett*, 477 U.S. 317, 323–24 (1986).

21 In determining summary judgment, a court applies a burden-shifting analysis. "When the  
22 party moving for summary judgment would bear the burden of proof at trial, it must come  
23 forward with evidence which would entitle it to a directed verdict if the evidence went  
24 uncontroverted at trial. In such a case, the moving party has the initial burden of establishing the  
25 absence of a genuine issue of fact on each issue material to its case." *C.A.R. Transp. Brokerage*

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<sup>2</sup> Maidman does not specify any particular correctional facility in Tonopah, but the Court understands him to refer to the Nye County Jail.

1 *Co. v. Darden Rests., Inc.*, 213 F.3d 474, 480 (9th Cir. 2000) (citations omitted). In contrast,  
2 when the nonmoving party bears the burden of proving the claim or defense, the moving party  
3 can meet its burden in two ways: (1) by presenting evidence to negate an essential element of the  
4 nonmoving party's case; or (2) by demonstrating that the nonmoving party failed to make a  
5 showing sufficient to establish an element essential to that party's case on which that party will  
6 bear the burden of proof at trial. *See Celotex*, 477 U.S. at 323–24. If the moving party fails to  
7 meet its initial burden, summary judgment must be denied and the court need not consider the  
8 nonmoving party's evidence. *See Adickes v. S.H. Kress & Co.*, 398 U.S. 144, 159–60 (1970).

9 If the moving party satisfies its initial burden, the burden then shifts to the opposing party  
10 to establish that a genuine issue of material fact exists. *See Matsushita Elec. Indus. Co. v. Zenith*  
11 *Radio Corp.*, 475 U.S. 574, 586 (1986). To establish the existence of a factual dispute, the  
12 opposing party need not establish a material issue of fact conclusively in its favor. It is sufficient  
13 that “the claimed factual dispute be shown to require a jury or judge to resolve the parties’  
14 differing versions of the truth at trial.” *T.W. Elec. Serv., Inc. v. Pac. Elec. Contractors Ass’n*, 809  
15 F.2d 626, 631 (9th Cir. 1987). In other words, the nonmoving party cannot avoid summary  
16 judgment by relying solely on conclusory allegations that are unsupported by factual data. *See*  
17 *Taylor v. List*, 880 F.2d 1040, 1045 (9th Cir. 1989). Instead, the opposition must go beyond the  
18 assertions and allegations of the pleadings and set forth specific facts by producing competent  
19 evidence that shows a genuine issue for trial. *See Celotex*, 477 U.S. at 324.

20 At summary judgment, a court's function is not to weigh the evidence and determine the  
21 truth but to determine whether there is a genuine issue for trial. *See Anderson*, 477 U.S. at 249.  
22 The evidence of the nonmovant is “to be believed, and all justifiable inferences are to be drawn in  
23 his favor.” *Id.* at 255. But if the evidence of the nonmoving party is merely colorable or is not  
24 significantly probative, summary judgment may be granted. *See id.* at 249–50.

25 To be liable under 42 U.S.C. § 1983, a defendant must have personally participated in the  
26 alleged misconduct. *Taylor*, 880 F.2d at 1045. There is no *respondeat superior* liability under  
27 § 1983. *Id.* Thus, a supervisor cannot be liable merely because a subordinate engaged in illegal  
28 behavior. Rather, “[a] supervisor is liable under § 1983 for a subordinate's constitutional

1 violations ‘if the supervisor participated in or directed the violations, or knew of the violations  
2 and failed to act to prevent them.’” *Maxwell v. County of San Diego*, 708 F.3d 1075, 1086 (9th  
3 Cir. 2013) (quoting *Taylor*, 880 F.2d at 1045).

4 Here, the only evidence linking either of the Defendants to the unsanitary conditions in the  
5 jail cell is Maidman’s grievance form, which he attached to the FAC. (Dkt. No. 6 at 11.) The  
6 Court cannot consider this document, however, because it has not been authenticated and is not  
7 self-authenticating. FED. R. EVID. 901–02; *Orr v. Bank of Am.*, 285 F.3d 764, 773 (9th Cir. 2002)  
8 (“A trial court can only consider admissible evidence in ruling on a motion for summary  
9 judgment.”); *see Campbell v. Brown*, 2007 WL 809806 at \*4 (E.D. Cal. 2007) (excluding a  
10 similar document prepared by a prisoner as not self-authenticating).

11 But even if the Court could consider this document, it establishes only that Rising knew  
12 about a non-working toilet. (See Dkt. No. 6 at 11.) It does not sufficiently establish that Rising  
13 failed to take any action to correct the problem. To the contrary, she appears to have told the  
14 officer who responded to Maidman that the repair part had been ordered and would be installed  
15 within two days. Based on this evidence, a reasonable jury could not conclude that Rising “failed  
16 to act to prevent” the sanitary problem. *Maxwell*, 708 F.3d at 1086. Maidman’s allegations in the  
17 FAC and in his response to the Motion are mere argument and cannot be considered as evidence.  
18 *See Taylor*, 880 F.2d at 1045.

19 As to the availability of current, meaningful legal materials at NCDC, there is no evidence  
20 that Defendants were aware of this alleged problem.

21 Because Maidman has not provided sufficient factual support that Defendants personally  
22 participated in the alleged constitutional violations, Defendants are not liable under § 1983 as a  
23 matter of law. *See Taylor*, 880 F.2d at 1045.

The Court grants Defendants' Motion for Summary Judgment. The Clerk of Court shall enter judgment accordingly.

DATED this 13<sup>th</sup> day of January, 2014.

  
ANDREW P. GORDON  
UNITED STATES DISTRICT JUDGE